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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF MISSOURI, Petitioner, v. DONALD GREER, Respondent, * STATE OF MISSOURI, Petitioner, v. TOMMY BRYANT KENDRICK, Respondent, * STATE OF MISSOURI, Petitioner, v. ROLLAN ANTHONY WILLIAMS, Respondent.	Cause No. 80-997

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Rollan Anthony Williams, hereinafter referred to as respondent, by and through his attorney, and moves this Court pursuant to 28 U.S.C. § 1915 and Rule 46 of the Supreme Court for leave to proceed in forma pauperis for the following reasons:

1. On this date respondent has filed a brief in opposition to granting the petition for writ of certiorari in the above-captioned cause;

2. Respondent is a prisoner in the Missouri Department of Corrections, has no means of income, and is without funds to pay the costs or fees in this cause;

3. Upon a showing of indigency in the Circuit Court of St. Louis County, Missouri, Michael J. Gorla was appointed to represent respondent and has represented him throughout the trial and appeals in state court;

4. Respondent was granted leave to file his appeal to the Missouri Supreme Court in forma pauperis following the judgment and sentence of the trial court;

5. Respondent has filed a petition for writ of certiorari in forma pauperis in this Court in Cause Number 80-6055, docketed on January 14, 1981.

6. Respondent's financial status is identical to what it was on January 14, 1981, and Respondent's Affidavit in Support of Motion to Proceed in Forma Pauperis which was filed in Cause Number 80-6055 is attached hereto.

WHEREFORE, for the foregoing reasons, respondent requests leave to proceed in forma pauperis.

Respectfully submitted,

Michael J. Gorla

MICHAEL J. GORLA
Attorney for Respondent Williams
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

A F F I D A V I T

MICHAEL J. GORLA, being first duly sworn on his oath, states that he is an attorney licensed to practice law in the State of Missouri and is a member of the Bar of the United States Supreme Court. Affiant further states that he represents respondent in this cause and the facts stated in the foregoing Motion for Leave to Proceed in Forma Pauperis are true to the best of his knowledge and belief.

Michael J. Gorla
MICHAEL J. GORLA

Subscribed and sworn to before me this 9 day of April, 1981.

Catherine M. Dolan
Notary Public

My Commission Expires: 10-7-84

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF MISSOURI, Petitioner, v. DONALD GREER, Respondent, *	Cause No. 80-997 (Previously submitted in Cause No. 80-6055)
STATE OF MISSOURI, Petitioner, v. TOMMY BRYANT KENDRICK, Respondent, *	
STATE OF MISSOURI, Petitioner, v. ROLLAN ANTHONY WILLIAMS, Respondent.	

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

Affiant states as follows:

1. I, Rollan Anthony Williams, am filing in this Court, through my attorney, a cross-petition for writ of certiorari in the above-captioned cause;

2. I am presently incarcerated in the Missouri Department of Corrections under a sentence imposed upon me in connection with the above-captioned cause;

3. I have no means of income and I am without funds to pay the costs of this proceeding or to give security therefor;

4. I have been represented by Michael J. Gorla, an attorney appointed by the Court, throughout the proceedings in state court;

5. The cross-petition for writ of certiorari in the above-captioned cause is taken in good faith upon my belief that I am entitled to redress.

Rollan A Williams #37240
ROLLAN ANTHONY WILLIAMS

Subscribed and sworn to before me this _____ day of _____, 198 .

Robert A. Foreman
NOTARY PUBLIC

My Commission Expires:

ROBERT A. FOREMAN
NOTARY PUBLIC STATE OF MISSOURI
MY COMMISSION EXPIRES AUGUST 1, 1984

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

A F F I D A V I T

Comes now Michael Joseph Gorla, duly deposed and sworn, and states as follows:

1. I am an attorney licensed to practice law in the State of Missouri, and a member of the Bar of the United States Supreme Court.

2. I have been appointed in the Circuit Court of St. Louis County, State of Missouri, to represent Rollan Anthony Williams, both at his trial and on appeal, and I am the attorney for Mr. Williams on his cross-petition for certiorari styled Rollan A. Williams v. Missouri, Cause Number 80-6055, docketed January 14, 1981, and I also represent Mr. Williams as a respondent in State of Missouri v. Rollan A. Williams, et al, Cause Number 80-997, docketed December 15, 1980.

3. On April 9, 1981, respondent Williams placed in the mail at the United States Post Office in Clayton, Missouri, the appropriate number of his brief in opposition to the State of Missouri's petition for writ of certiorari in Cause Number 80-997 addressed, first class postage prepaid, to the United States Supreme Court in Washington, D.C. Respondent also placed in the mail one copy of the brief in opposition addressed, first class postage prepaid, to each attorney of record in Cause Number 80-997; Mr. Paul Robert Otto, Assistant Attorney General, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102; Mr. Phillip Schwarz, Esq., Traders Bank Building, Suite 1510, 1125 Grand, Kansas City, Missouri 64106; Mr. David Robards, Esq., Public Defender, Jasper County Courthouse, Joplin, Missouri 64801.

4. Pursuant to Supreme Court Rule 28.2, respondent submits this affidavit to show timely filing and proper service.

Michael J. Gorla
MICHAEL JOSEPH GORLA

Subscribed and sworn to before me this 9 day of April, 1981.

Catherine M. Dolan
Notary Public

My Commission Expires: 12-7-84

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
DONALD GREER,	)	
	)	
Respondent,	)	
	)	Cause No. 80-997
*	)	
	)	
STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TOMMY BRYANT KENDRICK,	)	
	)	
Respondent,	)	
	)	
*	)	
	)	
STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
ROLLAN ANTHONY WILLIAMS,	)	
	)	
Respondent.	)	

BRIEF IN OPPOSITION
TO GRANTING PETITION FOR WRIT OF CERTIORARI

MICHAEL J. GORLA
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

Attorney for Respondent Rollan Anthony Williams

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both first degree robbery §560.120, RSMo. 1969, and armed criminal action §559.225 RSMo. Supp. 1976, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter, and where the Supreme Court of Missouri has held that the state legislature has intended that punishment be separately imposed for both offenses?

2. Whether the Missouri Supreme Court's most recent decision in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), vacated, 446 U.S. 962 (1980), aff'd on rehearing, 603 S.W.2d 592 (Mo. banc 1980), cert. denied, ____U.S.____, 101 S.Ct. 953 (1981), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violated the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in Brintley v. Michigan, 444 U.S. 948 (1979)?; therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, §750.529, M.C.L.A., and possession of a firearm during the commission of a felony, §750.227(b), M.C.L.A..

3. Whether the Missouri Supreme Court's most recent decision in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), vacated 446 U.S.

962 (1980), aff'd on rehearing, 603 S.W.2d 592 (Mo. banc 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 953 (1981), conflicts with this Court's decision rendered in Whalen v. Unites States, 445 U.S. 684 (1980)?

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OPINION BELOW

The opinion of the Missouri Supreme Court in the case of State of Missouri v. Rollan Anthony Williams is reported at 606 S.W.2d 777 (Mo. 1980). A copy of the opinion appears in Appendix A of the State of Missouri's petition.

STATEMENT OF THE CASE

Respondent Williams was charged by way of amended information with counts I and III, robbery in the first degree, §560.120, RSMo 1969, and counts II and IV, armed criminal action §559.225 RSMo Supp. 1976. After a jury trial, respondent was convicted on all four (4) counts and sentenced to a term of life imprisonment on each count, with said terms ordered to run concurrent.

On appeal, the Missouri Supreme Court vacated the armed criminal action convictions relying upon the authority of Sours v. State, 543 S.W.2d 208 (Mo. banc 1980), vacated, 446 U.S. 962 (1980), aff'd on rehearing, 603 S.W.2d 592 (Mo. banc 1980), cert. denied, ____ U.S. ____, 101 St. Ct. 953 (1981).

THE REASONS FOR DENYING THE WRIT

Respondent submits that a writ of certiorari should not issue to review the judgment of the Missouri Supreme Court on the questions presented by the petitioner because said judgment is in accordance with the applicable decisions of this Court.

As stated in the petition for writ of certiorari, the decision of the Missouri Supreme Court in this case is based upon its holding in the case of Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), vacated, 446 U.S. 962 (1980), aff'd on rehearing, 603 S.W.2d 592 (Mo. banc 1980), cert. denied, ___ U.S. ___, 101 S.Ct. 953 (1981). In the original Sours decision, the Missouri Supreme Court held that : 1) The offense of armed criminal action, §559.225, RSMo Supp. 1976, and its underlying felony offense are the same offense under the test articulated in Blockburger v. United States, 284 U.S. 299 (1932), because proof of the armed criminal action cannot be had without proof of the underlying felony; and 2) The prosecution and conviction of a defendant on both armed criminal action and the underlying felony in a single proceeding constitutes multiple punishment for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution. On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in the original Sours decision in Missouri v. Sours, 446 U.S. 962 (1980), and remanded the case to the Missouri Supreme Court for reconsideration in light of Whalen v. United States, 445 U.S. 684 (1980). On remand, the Missouri Supreme Court held that the

Whalen decision did not disturb its original holding in Sours, and reaffirmed its earlier decision. Sours v. State, 603 S.W.2d 592 (Mo. banc 1980).

Petitioner contends that the Missouri Supreme Court has misinterpreted this Court's decision in Whalen, supra, and that Sours' conclusion that the federal double jeopardy clause bars the prosecution and conviction of a defendant on the charges of armed criminal action and the underlying felony in a single proceeding conflicts with this Court's summary dismissal in Brintley v. Michigan, 444 U.S. 948 (1979), and the applicable decisions of this Court. Respondent respectfully disagrees.

In Whalen, the District of Columbia Court of Appeals affirmed the consecutive sentences imposed in a single prosecution for the offense of rape and the offense of felony murder, the killing committed in perpetration of the rape. This Court reversed on the finding that Congress had not authorized consecutive sentences for the two offenses and thus the trial court had exceeded its authority in imposing consecutive sentences.

Contrary to the State of Missouri's argument in its petition for certiorari, the majority opinion in Whalen did not conclude that a defendant can be punished in one proceeding for two crimes if the legislature so intends even though both offenses are considered the same offense under the Blockburger test. Petitioner bases its interpretation of Whalen on language contained in the concurring and dissenting opinions. It appears that such a view may be held by the Chief Justice, Justices White, Rehnquist and Blackman, but the fact is that the majority in Whalen did not reach that issue, and did not so hold. The majority in Whalen

made it clear that it was basing its decision on statutory interpretation and not on constitutional grounds. Since this Court found that Congress did not intend to punish a defendant both for rape and the killing committed in the perpetration of said rape, the Whalen case was disposed of without resort to the application of the double jeopardy clause of the Fifth Amendment.

The Missouri Supreme Court correctly interpreted and applied Whalen in its reconsideration of Sours v. State, 603 S.W.2d 592 (Mo. banc 1980). After examining the legislative intent behind the armed criminal action statute, §559.225 RSMo Supp. 1976, and applying every possible test and standard available for statutory construction, the Missouri Supreme Court concluded that the "General Assembly did clearly intend to impose two punishments for armed criminal action and the lesser included offense." Sours v. State, supra, 603 S.W.2d at 603. The statutory interpretation which was dipositive of the issue in Whalen does not solve the problem in Sours.

Petitioner also contends that the Sours decisions conflict with this Court's summary dismissal in Brintley v. Michigan, 444 U.S. 948 (1979). As set out in the State of Missouri's petition at page 8, the following question was sought to be presented in Brintley:

> "Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, §750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation

> of §750.227(b) where there is no evidence that weapon has been possessed for any other purpose than the commission of underlying felony, where underlying felony is specifically charged as a felony element of firearms possession charge, and where (in armed robber case) state has already augumented punishment for armed robberies above punishment imposed for unarmed robberies. 26 Crim.L.Rep. 4113 (§750.227(b), M.C.L.A. appears in Appendix D of State's Petition).

What is not pointed out in the petition for certiorari is that in Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 794 (1979), one of the cases consolidated in Brintley, the Michigan Supreme Court determined that the Michigan felony firearms statute and the underlying felony were distinct and separate offenses. This Court is bound by the construction of a state statute by the highest court of a state, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973), and thus, this Court's dismissal for no substantial federal question in Brintley was warranted by the Michigan Supreme Court's finding that the felony firearms statute and the underlying felony are not the same offense. As stated earlier herein, the Missouri Supreme Court in Sours v. State, supra, has determined that armed criminal action, and the underlying felony are the same offense, and so, this Court's summary dismissal in Brintley is inapplicable to the situation in Missouri.

Finally, petitioner contends that the Sours decisions conflict with the applicable decisions of this Court interpreting the meaning and scope of the double jeopardy clause of the U.S. Constitution. The Missouri Supreme Court has set out a complete and thorough analysis of the law in this area, and its analysis correctly interprets and applies the decision of this Court. Sours v. State, supra, 593 S.W.2d at 211-214, 218-221; 603 S.W.2d at

603-606. Said analysis emphasizes that this Court has consistently stated that the double jeopardy clause of the U.S. Constitution serves three purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishment for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969); Brown v. Ohio, 432 U.S. 161 (1977); Harris v. Oklahoma, 433 U.S. 682 (1977); Illinois v. Vitale, ____ U.S. ____, 100 S.Ct. 2260 (1980).

While Petitioner contends that the above authorities apply in situations involving successive prosecutions and that the legislature can authorize punishment in a single proceeding for both an offense and a lesser included offense, such is not correct. While the first two purposes of double jeopardy deal with the problem of successive prosecutions, the third purpose does not. In fact, if the multiple punishment protection dealt only with successive prosecutions, then the third purpose would be nothing more than a restatement of the other two. The protection against multiple punishment for the same offense would be rendered useless were the state able to do in one prosecution what it cannot do in two prosecutions. Regarding the petitioner's contention that the legislature can constitutionally authorize punishment for both an offense and a lesser included offense, if that were true, the protection against multiple punishment, which was recently cited with approval in Illinois v. Vitale, supra, would become a nullity.

As stated earlier, the Missouri Supreme Court has decided that armed criminal action §559.225 RSMo Supp. 1976, and the underlying felony are the same offense, and that the Missouri legislature has intended to separately punish both offenses. This Court is bound by the Missouri Supreme Court's interpretation of Missouri statutes. Memorial Hospital v. Maricopa County, supra. Therefore, applying the teachings of this Court, to prosecute and convict a defendant of both armed criminal action and the underlying felony constitutes multiple punishment for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, respondent submits that petitioner's writ of certiorari be denied.

Respectfully submitted,

Michael J. Gorla
MICHAEL J. GORLA, 26399
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

Attorney for Respondent Rollan Anthony Williams

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